IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12249 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ROYAL CUSHION VINYL PRODUCTS LIMITED - Petitioner(s)

Versus

UNION OF INDIA & 2 - Respondent(s)

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Appearance :
MR DV PARIKH for Petitioner No(s).: 1.

NOTICE NOT RECD BACK for Respondent No(s).: 1, 2,3.
MR JITENDRA MALKAN for Respondent No(s).: 1 - Absent
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CORAM : HON'BLE MR.JUSTICE D.A.MEHTA
and
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 22/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1. Heard Mr.D.V.Parikh, the learned advocate for the petitioner. None appears on behalf of the respondents though Mr.Malkan had prayed for time on 15th July 2005 and his request had been granted.

2. The limited issue which the Court is called upon to decide is whether the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai (CESTAT), while disposing of Stay Application No.E/S/2796/04-MUM vide order dated 29th March 2005 was required or not to deal with the merits of the controversy – as to whether the petitioner has a *prima facie* case or not. In the circumstances, the petition is taken up for final hearing and disposal today.

3. It is the case of the petitioner that it is engaged in the manufacture of PVC Floor Covering Lamination Sheets (MF) in form of tiles / sheets / rolls and PVC Cushion Vinyl flooring in different colours and grades falling under Chapter Sub-heading 6807.90 of the Central Excise Tariff Act, 1985. However, the respondent authority held that the said products were properly classifiable under Chapter Heading 3918 of the Tariff Act as articles of plastics. The assessee succeeded before the adjudicating authority, but the Department carried the matter in appeal and the Commissioner (Appeals) upheld the stand of the Department, against which the

petitioner preferred appeal before the CESTAT. Along with the appeal, the petitioner had moved an application seeking stay of operation of the impugned order and dispense with making of pre-deposit. On 29th March 2005, CESTAT made an order directing the petitioner to deposit a sum of Rs.30 lakhs treating the same as sufficient compliance for the purpose of Section 35F of the Central Excise Act, 1944. It is submitted by Mr.Parikh that all other manufacturers manufacturing similar articles are being assessed under Chapter Sub-Heading 6807.90 of the Tariff Act and accordingly, the petitioner has a good case on merits. That the Tribunal has not taken into consideration various grounds raised in support of the plea for complete waiver of the pre-deposit.

4. As can be seen from the application for stay (Annexure “H”), the petitioner has made various submissions before the CESTAT and relied upon various decisions of Tribunal and Supreme Court. The petitioner has also raised ground as to why the Commissioner (Appeals) has erroneously distinguished the decisions in case of other manufacturers.

5. On going through the impugned order of Tribunal, it is apparent that, after recording facts in paragraph Nos. 1 to 7 of its order, the Tribunal has in paragraph No.8

stated that, “The appellants pleaded financial hardship and the matter is said to be pending before the BIFR”. Thereafter, in paragraph No.9, reference to Supreme Court decision in case of Metal Box has been made to state that an absolute waiver cannot be granted. The final direction immediately follows thereafter, directing the petitioner to make pre-deposit of a sum of Rs.30 lakhs. In the entire order, there is no discussion as to whether or not the petitioner has a *prima facie* case. In paragraph No.7, the Tribunal has itself recorded that the Commissioner (Appeals) had initially directed making of pre-deposit of Rs.60 lakhs towards duty payment and Rs.6 lakhs towards penalty, but on re-consideration, waived the pre-deposit of the entire amount. In the circumstances, the present case falls within the ratio of the Apex Court decision in case of Mehsana Dist. Co-op. Milk P.U. Ltd. V/s Union of India, 2003 (154) ELT 347 (SC), wherein the Apex Court has stated that, “The appellate authority has not at all considered the *prima facie* merits and has concentrated upon the *prima facie* balance of convenience in the case. The Appellate Authority should have addressed its mind to the *prima facie* merits of the appellants' case and upon being satisfied of the same determined the quantum of deposit taking

into consideration the financial hardship and other such relevant factors."

6. Therefore, the impugned order dated 29th March 2005 (Annexure "I") is hereby quashed and set aside, and the Stay Application No.E/S/2796/04-MUM is restored to file. CESTAT shall hear the stay application afresh after giving adequate opportunity to both the sides.

7. The petition is accordingly allowed. There shall be no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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